97TH CONGRESS } HOUSE OF REPRESENTATIVES { REPT. 97-637
2d Session } { Part 2

EXPORT TRADING COMPANY ACT OF 1981

JULY 26, 1982.—Ordered to be printed

Mr. RODINO, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H.R. 1799 which on February 6, 1981, was referred jointly to the Committee on Foreign Affairs, the Committee on Banking, Finance and Urban Affairs, the Committee on the Judiciary, and the Committee on Ways and Means]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1799) entitled: "The Export Trading Company Act of 1981", having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments (stated in terms of the page and line numbers of the introduced bill) are as follows:

Page 1, after line 2, insert the following:

TITLE I—EXPORT TRADING COMPANIES

Page 1, line 4, strike out "section 1. This Act" and insert in lieu thereof "Sec. 101. This title".

Page 1, line 7, strike out "Sec. 2." and insert in lieu thereof "Sec. 102.".

Page 3, line 24, strike out "Act" and insert in lieu thereof "title".

Page 4, beginning on line 5, strike out ", by making" and all that follows through line 9, and insert in lieu thereof a period.

Page 4, strike out line 11 and insert in lieu thereof the following:

SEC. 103. (a) As used in this title—

Page 6, line 24, strike out "Act" and insert in lieu thereof "title".

Page 7, line 3, strike out "Sec. 4." and insert in lieu thereof "Sec. 104.".

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Page 7, strike out line 11.

Page 7, line 14, strike out "Sec. 101." and insert in lieu thereof "Sec. 105.".

Page 11, line 4, strike out "section 3(5) of this Act" and insert in lieu thereof "section 103(5) of this title".

Page 11, line 7, strike out "section 3(4) of this Act" and insert in lieu thereof "section 103(4) of this title".

Page 18, beginning on line 19, strike out "section 2 of this Act." and insert in lieu thereof "section 102 of this title.".

Page 19, line 1, strike out "Act" and insert in lieu therof "title".

Page 19, line 7, strike out "Act" and insert in lieu thereof "title".

Page 21, line 19, strike out "Sec. 102." and insert in lieu thereof "Sec. 106.".

Page 22, line 12, strike out "Sec. 103." and insert in lieu thereof "Sec. 107.".

Page 22, line 15, strike out "section 3(5) of this Act" and insert in lieu thereof "section 103(5) of this title".

Page 23, strike out line 3 and all that follows through page 41, and insert in lieu thereof the following new title:

TITLE II—EXPORT TRADE CERTIFICATES OF REVIEW

EXPORT TRADE PROMOTION DUTIES OF ATTORNEY GENERAL

SEC. 201. To promote and encourage export trade, the Attorney General may issue certificates of review. The Secretary of Commerce, in carrying out his responsibilities to promote the export of goods and services of the United States, may advise and assist persons with respect to applying for certificates of review.

APPLICATION FOR ISSUANCE OF CERTIFICATE OF REVIEW

SEC. 202. (a) To request the issuance of a certificate of review, a person shall submit to the Secretary of Commerce or the Attorney General a written application which—

(1) specifies conduct limited to export trade, and

(2) is in a form and contains any information required by rule issued under section 211.

Each application received by the Secretary of Commerce shall be forwarded, not later than 7 days after receipt, to the Attorney General.

(b)(1) With respect to each application submitted under subsection (a), the Attorney General shall publish in the Federal Register notice that a certificate of review has been requested, the identity of each person requesting the certificate, and a description of the conduct with respect to which the certificate is requested. The notice shall be so published promptly, but not later than 10 days, after the application is received by the Attorney General.

(2) The Attorney General may not issue the certificate until the expiration of the 30-day period beginning on the date the application is received by the Attorney General.

ISSUANCE OF CERTIFICATE

SEC. 203. (a) The Attorney General shall issue a certificate of review to an applicant for the certificate if the application for the certificate satisfies the requirements of section 202, unless the Attorney General determines under subsection (b) that the conduct specified in the application is likely to violate the antitrust laws.

(b) (1) Not later than 60 days after the Attorney General receives an application under section 202, the Attorney General shall determine whether the conduct specified in the application is likely to violate the antitrust laws, except that if before the expiration of the 60-day period the Attorney General requests that the applicant submit additional information, the Attorney General shall make the determination not later than the expiration of the 60-day period, or of the 30-day period beginning on the date the additional information is submitted, whichever period ends later.

(2) If the Attorney General determines that the conduct specified in the application is not likely to violate the antitrust laws, the Attorney General shall immediately issue a certificate of review to the applicant. If the Attorney General determines that the conduct specified in the application is likely to violate the antitrust laws, the Attorney General shall promptly transmit to the applicant a statement of the determination and the reasons in support of the determination.

(c) If the Attorney General denies an application for the issuance of a certificate of review and thereafter receives from the applicant a request for the return of all documents submitted by the applicant in connection with the issuance of the certificate, the Attorney General shall return to the applicant, not later than 30 days after receiving the request, the documents and all copies of the documents available to the Attorney General, except to the extent that the information contained in a document has been made available to the public.

(d) The Attorney General shall specify in each certificate of review issued under this section—

(1) the conduct, including activities and methods of operation, to which the certificate applies,

(2) the business entities participating in the conduct, and

(3) any terms and conditions applicable to the conduct.

(e) A certificate of review obtained by fraud is void ab initio.

REPORTING REQUIREMENT; AMENDMENT OF CERTIFICATE

SEC. 204. (a) Any person who receives a certificate of review—

(1) shall promptly report to the Attorney General any change relevant to the matters specified under section 203(d) in the certificate, and

(2) may submit to the Attorney General an application to amend the certificate to reflect the fact or effect of the change on the conduct specified in the certificate.

(b) For purposes of section 202 and section 203, an application for an amendment to a certificate of review shall be deemed to be an application for the issuance of a certificate of review, except that the effective date of the amendment shall be the date on which the application for the amendment is submitted to the Attorney General.

MODIFICATION OR REVOCATION OF CERTIFICATE

SEC. 205. (a) If at any time the Attorney General determines that the conduct engaged in under a certificate of review violates or is likely to violate the antitrust laws, the Attorney General shall give written notice of the determination to the person to whom the certificate was issued. The notice shall include a statement of the reasons in support of the determination. In the 30-day period beginning 30 days after the notice is given, the Attorney General shall modify or revoke the certificate, as may be appropriate.

(b) The person to whom the affected certificate was issued may bring an action in any appropriate district court of the United States to set aside the determination made under subsection (a) on the ground that the determination is erroneous.

JUDICIAL REVIEW; ADMISSIBILITY

SEC. 206. (a) Except as provided in section 205(b), no determination made by the Attorney General with respect to the issuance, amendment, or revocation of a certificate of review shall be subject to judicial review.

(b) No determination made by the Attorney General with respect to the issuance, amendment, or revocation of a certificate of review shall be admissible in evidence in any administrative or judicial proceeding in support of any claim under the antitrust laws.

PROTECTION CONFERRED BY CERTIFICATE OF REVIEW

SEC. 207. (a) No person to whom a certificate of review is issued shall be subject to a criminal action for a violation of the antitrust laws or a violation of any State law similar to the antitrust laws if the violation arises from conduct specified in the certificate and if the certificate is in effect at the time the conduct occurs.

(b) No person to whom a certificate of review is issued shall be liable for damages in a civil action brought by the Attorney General or a State for a violation of the antitrust laws or of any State law similar to the antitrust laws if the violation

arises from conduct specified in the certificate and if the certificate is in effect at the time the conduct occurs.

(c) (1) No person to whom a certificate of review is issued shall be liable for damages exceeding actual damages, the loss of interest on actual damages, and the cost of suit (including a reasonable attorney's fee) for a violation of the antitrust laws or of any State law similar to the antitrust laws if the violation arises from conduct specified in the certificate and if the certificate is in effect at the time the conduct occurs.

(2) If, with respect to any claim under section 4 of the Clayton Act (15 U.S.C. 15) brought against the person, the court finds that—

(A) the conduct alleged to violate the antitrust laws does not violate the antitrust laws,

(B) the conduct is conduct specified in a certificate of review, and

(C) the certificate of review was in effect at the time the conduct occurred,

the court shall award to the person against whom the claim is brought the cost of suit attributable to defending against the claim (including a reasonable attorney's fee).

(d) No person to whom a certificate of review is issued shall be liable under section 16 of the Clayton Act (15 U.S.C. 26) with respect to threatened loss or damage by a violation of the antitrust laws if the threatened loss or damage arises from conduct specified in the certificate of review and if the certificate is in effect at the time the conduct occurs.

INJUNCTIVE RELIEF

SEC. 208. Except as provided in section 207(d), a certificate of review shall have no legal effect on the authority of a court to grant equitable relief in an action for a violation of the antitrust laws brought against the person to whom the certificate is issued. In granting the relief, the court shall have jurisdiction to modify or revoke the certificate of review, as may be appropriate.

DISCLOSURE OF INFORMATION

SEC. 209. (a) Information submitted by any person in connection with the issuance, amendment, or revocation of a certificate of review shall be exempt from disclosure under section 552 of title 5, United States Code.

(b) (1) Except as provided in paragraph (2), no officer or employee of the United States shall disclose commercial or financial information submitted in connection with the issuance, amendment, or revocation of a certificate of review if the information is privileged or confidential and if disclosure of the information would cause harm to the person who submitted the information.

(2) Paragraph (1) shall not apply with respect to information disclosed—

(A) upon a request made by the Congress or any committee of the Congress,

(B) in a judicial or administrative proceeding,

(C) with the consent of the person who submitted the information,

(D) in the course of making a determination with respect to the issuance, amendment, or revocation of a certificate of review, if the Attorney General deems disclosure of the information to be necessary in connection with making the determination,

(E) in accordance with any requirement imposed by a statute of the United States, or

(F) in accordance with any rule issued under section 211 permitting the disclosure of the information to an agency of the United States or of a State on the condition that the agency will disclose the information only under the circumstances specified in subparagraphs (A) through (E).

DESCRIPTIVE GUIDELINES

SEC. 210. (a) To promote greater certainty regarding the application of the antitrust laws to export trade, the Attorney General may issue guidelines—

(1) describing specific types of conduct with respect to which the Attorney General has made, or would make, determinations under section 203 and section 205, and

(2) summarizing the factual and legal bases in support of the determinations.

(b) Section 553 of title 5, United States Code, shall not apply to the issuance of guidelines under subsection (a).

ISSUANCE OF RULES

SEC. 211. Not later than 90 days after the date of the enactment of this Act, the Attorney General shall issue rules to carry out this title.

DEFINITIONS

SEC. 212. For purposes of this title—

(1) the term "antitrust laws" shall have the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), except that the term shall include section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that section 5 applies to unfair methods of competition,

U.S.C. 45) to the extent that section 5 applies to unfair methods of competition,

(2) the term "Attorney General" means the Attorney General of the United States or his designee,

(3) the term "certificate of review" means a certificate issued by the Attorney General under section 203,

(4) the term "export trade" means the export of goods or services from the United States to foreign nations, and

(5) the term "State" shall have the meaning given it in section 4G of the Clayton Act (15 U.S.C. 15q).

EFFECTIVE DATE

SEC. 213. (a) Except as provided in subsection (b), this title shall take effect on the date of the enactment of this Act.

(b) Section 202 and section 203 shall take effect 90 days after the effective date of the rules first issued under section 211.

Amend the title so as to read:

A bill to increase exports by facilitating investment in export trading companies and by modifying the application of the antitrust laws to certain export trade, and for other purposes.

I. PURPOSE

The purpose of H.R. 1799, the Export Trading Company Act, is to increase the export trade of the United States by encouraging joint activity that will lead to economies of scale in export operations. H.R. 1799 is a response to sentiment in the business community that certain federal banking and antitrust laws hamper the complete development of American export trade, especially among small and medium-sized businesses.

Title I of H.R. 1799 alters certain federal banking laws to allow banking institutions to participate in export trading companies. Title III, which was struck by the Committee, would have amended the Internal Revenue Code.

Title II, the focus of this Committee's action, is intended to minimize any antitrust uncertainty in joint export activities. Title II creates a procedure through which interested persons may apply for and receive a binding advisory opinion concerning application of the American antitrust laws to joint export activities. A successful applicant receives a certificate that will greatly reduce any exposure under the domestic antitrust laws. These features are particularly intended to encourage joint export activity among small and medium-sized firms, produce efficiencies and increase American exports.

II. SUMMARY OF THE REPORTED BILL

H.R. 1799, as reported, creates a procedure through which a person seeking to engage in export trade may seek a certificate of review from the Attorney General of the United States. The Attorney General shall issue the certificate of review to the applicant unless he determines that the conduct for which a certificate is sought is likely to violate the antitrust laws. The Attorney General must act within 60 days of receiving an application, unless he extends the period to obtain additional information. If the Attorney General denies the application, he shall state his reasons for doing so.

A certificate protects the holder against criminal liability and civil monetary liability arising from conduct covered by the certificate in actions brought by the federal or state governments alleging viola-

tions of federal or state antitrust laws. A holder is also protected from liability in excess of actual damages arising from conduct covered by the certificate in private actions under federal and state antitrust laws. Finally, a certificate protects the holder from private injunctive actions, except in instances in which there is actual—as opposed to threatened—harm.

H.R. 1799 also requires certificate holders to report changes in their operations and permits the Attorney General to revoke a certificate for cause after appropriate notice. In addition, H.R. 1799 limits the judicial reviewability of the Attorney General's determinations, preserves the confidentiality of the application to the maximum extent possible, and empowers the Attorney General to issue implementing rules and descriptive guides. H.R. 1799 also provides the Department of Commerce with a role in advising applicants and forwarding applications and providing information to the Department of Justice.

III. BACKGROUND

A. *Procedural history of export trading company legislation in the Committee on the Judiciary*

H.R. 1799 is one of several bills introduced in the 97th Congress that contemplate the formation and operation of export trading companies; similar bills include S. 734, passed by the Senate in April, 1981, H.R. 1648 and H.R. 2123. Each of these bills, as introduced, contains an antitrust title that would extend the Well-Pomerene Act protections to services, transfer its administration from the Federal Trade Commission to the Department of Commerce, and create a complex procedure intended to confer antitrust immunity to export activities covered by a certificate issued by the Department of Commerce.

The concept of export trading company legislation first gained significant support during the Carter Administration. Although the Senate passed S. 2718 during the 96th Congress, the House did not act on comparable legislation. In the 97th Congress, the various export trading proposals were introduced early in the first session. H.R. 1799 was introduced on February 6, 1981 by Mr. Bonker and was jointly referred to a number of Committees, including the Committee on the Judiciary. The Subcommittee on Monopolies and Commercial Law considered H.R. 1799 as part of a broader examination of the application of United States antitrust laws to international business transactions. Also included in that review was H.R. 5235, the Foreign Trade Antitrust Improvements Act of 1982, which the Committee ordered reported on May 18, 1982.

Hearings were held on March 26, April 8, and June 24, 1981. Testifying at the hearings were a number of experts, including current and former government officials, legal scholars, attorneys in private practice, and businessmen. A list of the witnesses may be found in the Committee's report on the Foreign Trade Antitrust Improvements Act (H.R. 5235).

As explained more fully below, a number of witnesses, as well as other interested commentators, criticized as cumbersome and ineffective the antitrust certification procedures in the export trading company bills which had been introduced. After the April 8 hearing, Chairman Rodino directed the staff to prepare a simplified draft to

meet the criticisms which have surfaced at the hearings and to solicit informally the views of interested persons including the Department of Commerce. This draft received favorable comment from the witnesses at the hearing on June 24, 1981.

On December 10, 1981, the Subcommittee caucused to discuss the progress of export trading company legislation and instructed the staff to prepare a draft that would establish simple and straightforward certification procedures, minimize judicial review of the application process, invest the Department of Justice with the power to grant or deny the certificates, and retain an injured person's ability to recover actual (as opposed to treble) damages in the event of proven violations of the antitrust laws.

On May 19, 1982, the Subcommittee met to consider H.R. 1799. Mr. Hughes offered an amendment incorporating the elements agreed upon by the Subcommittee at its December 10, 1981, caucus. On June 15, 1982, the full Committee met to consider H.R. 1799. Mr. Hughes offered two additional amendments to the bill as approved by the Subcommittee, affording the Department of Commerce a role in the application process. The Committee, by voice vote, adopted these amendments and ordered the bill reported.

B. Antitrust uncertainty

The hearing record reflects two related concerns that led to introduction and Committee consideration of this legislation. The first is a perception in the business community that joint activities that can produce efficiencies in the export of goods and services may violate American antitrust laws. As one expert testified, "(t)here exists a perception in the U.S. business community that the extraterritorial application of the U.S. antitrust laws inhibits exports and other forms of international business activity." Prepared statement of David N. Goldsweig, dated March 26, 1981 ("Goldsweig Statement"), at 2. In addition, courts have adopted varying definitions of the domestic effects considered sufficient to create American antitrust jurisdiction. "The vitality and profitability of U.S. export trade can easily suffer from the dampening effects of the uncertainty of current law." Prepared statement of James R. Atwood, dated April 8, 1981 ("Atwood Statement"), at 6.

C. The antitrust provisions of export trading company legislation

The basic technique that the various trading company measures use to solve the problem of uncertainty is a government certification procedure that provides either an exemption from the antitrust laws or a binding advisory opinion indicating whether the applicant's proposed conduct is consistent with the antitrust laws. Under S. 734 and H.R. 1799, as introduced, an association or export trading company would submit a written application to the Department of Commerce setting forth information about the applicant, the goods and services to be exported, and the activities in which, and methods through which, the applicant seeks to engage in export commerce. The Department of Commerce would then forward the application to the Attorney General and the Federal Trade Commission, who would play an advisory role in the decisionmaking process.

As introduced, H.R. 1799 required that the Secretary find that the activities and methods of the applicant do not restrain trade in the

United States and do not restrain the export trade of a competitor, and that the applicant does not take action by agreement or otherwise that either artificially or intentionally affects domestic prices, lessens domestic competition, or restrains trade in the United States. Under S. 734 and H.R. 1648, the applicant must meet similar antitrust standards; however, the applicant must also show that its activities preserve or promote export trade, do not constitute trade in the licensing of patents, trademarks, technology, or the like (except as incidental to the sale of goods or services), and do not result in domestic resale of the exported goods or services.

The Department of Justice and the Federal Trade Commission may advise in the decisionmaking process; however, the Secretary of Commerce alone determines whether to grant a certificate of review. After a certificate has been issued, the Department of Justice or the Federal Trade Commission may act to invalidate the certificate. Injured competitors and customers and other private parties cannot obtain any damages for injuries, nor may they seek injunctive relief to invalidate the certificate.

D. Testimony and comments concerning the certification procedures

The Subcommittee has received extensive testimony and a number of significant comments on the certification procedures in the export trading company bills.

(1) Testimony in favor of the certification procedures in the export trading company bills. Testimony in support of certification procedures generally, and the procedures embodied in the export trading company bills specifically, came from Secretary of Commerce Malcolm Baldrige. Secretary Baldrige stated that American competitiveness in the world market has been declining and that "there is an important link between our future economic health and the international competitiveness of our goods and services." Prepared statement of Honorable Malcolm Baldrige, dated March 26, 1981 ("Baldrige Statement"), at 4. The need for export trading companies is said to arise from the fact that small- and medium-sized American firms may not have necessary export skills and may not be large enough to achieve economies of scale in export. Id. at 4, 5.

> Our competitors abroad have had to learn how to export—small- and medium-sized firms as well as large firms—in order to survive. Too large a share of U.S. exports come[s] from large firms. We need a mechanism to stimulate and train these smaller firms in this skill such as their foreign competitors are doing.
>
> We need export trading companies that provide a full range of export services to firms of any size interested in exporting. These exporting companies must be sufficiently capitalized to allow operations on a scale that would achieve substantial economies in selling and distributing. These companies must be large and experienced enough to develop new markets for U.S. goods. (Id.)

Certification is necessary, Secretary Baldrige said, to give exporters assurances in the planning of joint international business activities. A "certificate which lists those activities deemed within the scope of

the antitrust exemption and offers maximum protection from treble damage suits" will afford what those forming export trading companies will want—"the maximum degree of confidence in the antitrust exemption." Id. at 7.

Secretary Baldrige defended the Department of Commerce's proposed role as the certifying authority on the ground that the Department of Commerce has a mission to promote exports. *Id.* at 8, 9; Hearing Transcript of March 26, 1981, at 38.

Also testifying on behalf of the certification concept of the export trading company bills was the Business Roundtable, whose comments were similar to those of Secretary Baldrige:

> In our view, it is desirable to make these alternate procedures available to those businesses who find it desirable to act through a licensed export association. The additional level of certainty available to such associations may be especially important to smaller exporters, who may shy away from arrangements that would otherwise have to rest on complicated legal opinions about the probable effects of the transaction. (Prepared statement of Martin F. Connor, dated April 8, 1981 ("Roundtable Statement"), at 20).

(2) *Criticism of the certification provisions in the export trading company legislation.* Many witnesses and commentators have criticized the certification procedures contained in the export trading company legislation. Indeed, some commentators believed that the procedures were so flawed that enactment would actually hinder, rather than help, American exports.

The strongest criticism was that the process, which involves the submission of detailed information, the coordination of three government departments and agencies, and a host of determinations by the Secretary of Commerce, was too complex to be practical. A simple and expedited procedure is needed to minimize the government resources devoted to the certification process, but also to accommodate the pace of international business transactions which frequently take place in a fluid and fast-paced environment. "International trade is a moving target. There must be daily decisions made as to what business opportunities to pursue." Hearing transcript of March 26, 1982, at 104 (David N. Goldsweig).

Many of the witnesses said that the certification procedures of the various export trading company proposals were too cumbersome to meet the needs of the business community. As Mr. A. Paul Victor testified:

> The problems that I see with [H.R.] 1648 include a very complex and uncertain certification proceeding. It would take some three to six months. It might even inhibit export opportunities requiring prompt action. The uncertainty is put in the hands of the regulators rather than the courts at least initially, and there is a potential dichotomy between Commerce and Justice. To me that doesn't make any sense whatsoever. The certification procedure could be complicated, expensive, burdensome, and counter to the climate of deregulation which we are all aware of today. It might even

> act as a deterrent to some joint conduct by the small and medium-sized companies that it is actually designed to help. And I don't think it will do away with the need for sophisticated antitrust counseling, in all candor. (Hearing transcript of March 26, 1981, at 59).

Mr. John H. Shenefield, former Assistant Attorney General in charge of the Antitrust Division, expressed a similar view. In enumerating the "clear disadvantages" of the export trading company certification procedures, Mr. Shenefield listed, "an enormously confusing and complex bureaucratic procedure, the potential that the bureaucratic procedure created will itself be an export disincentive even more serious than the antitrust one we assertedly now have, and finally, the fact that the substantive standards created in [H.R.] 1648 do not adequately protect domestic markets." Mr. Shenefield termed these provisions "a disaster." Hearing transcript of April 8, 1981, at 9. The Antitrust Section of the American Bar Association and others made similar comments. See American Bar Association, Section of Antitrust Law, "Report to Accompany Resolutions Concerning Legislative Proposals to Promote Export Trading," dated October 26, 1981 ("Antitrust Section Report"), at 24–28: Prepared Statement of Professor Eleanor Fox, dated March 26, 1981 ("Fox Statement"), at 3, 4.

Two special criticisms of the complexity of the procedures emerged in the hearing process. The first is that the involvement of three agencies and departments of government that have divergent goals and are subject to different political controls will breed delay, bureaucratic conflict, and ultimately, business uncertainty. As the ABA Antitrust Section noted, because the certification procedures of the export trading company bills "would place certifying and guidelines-writing authority in the Commerce Department but enforcement authority in the Justice Department and the Federal Trade Commission, [they] would invite interagency conflicts. The resulting delay and inconsistent government policy could only further inhibit aggressive export trading." Antitrust Section Report at 26–27.

Mr. Fred Emery, former Director of the Federal Register, testified that certification programs administered by one government authority, in consultation with a second government authority have not, in his view, worked very well:

> I think you have immediately established a potential problem. The areas where we have tried I don't think have worked very well. Aviation noise was split between EPA and the FAA, and I have yet to talk to anybody in either of those agencies that thinks it is working well. Each blames the other. The minute you create that dual role, knowing the way bureaucracies work, you have a potential problem, especially since everyone knows Justice's feeling about this type of legislation to start with. You put them in the position of being able to say no every time Commerce says yes. (Hearing Transcript of June 24, 1981, at 44).

A second criticism of the certification scheme of the various export trading company proposals is that the Department of Commerce should not be the decisionmaker because its principal mission is to promote commerce, not enforce the antitrust laws. A number of wit-

nesses expressed serious doubts about giving regulatory authority to a non-antitrust agency. "[R]eposing the power to award certifications of exemption from the antitrust laws in the Department of Commerce is a misplacement of authority that could lead to abuse. The Department of Commerce [has] no antitrust expertise and can hardly be expected to be sensitive and sympathetic to the policy aims of laws that from time to time do impose restraints, albeit beneficial ones, on its business constituency." Prepared statement of John H. Shenefield dated April 8, 1981 ("Shenefield Statement"), at 12–13; see Prepared Statement of A. Paul Victor, dated March 26, 1981, ("Victor Statement"), at 7.

Questions were also raised about the protections these certification procedures would afford. A plaintiff seeking damages in a private action under Section 4 of the Clayton Act may well allege that the defendant's conduct exceeded the scope of the certificate:

> I cannot see how H.R. 1648 will do away with the need for sophisticated antitrust counseling, or will eliminate the possibility of complicated litigation by those who feel seriously aggrieved by supposedly exempt joint conduct, or by private parties and even by the government claiming that the joint activity is not really exempt, but ultra vires of the intended protection. (Victor Statement at 8).

Moreover, a person who receives a certificate from the Department of Commerce over the objections of the Department of Justice or the Federal Trade Commission can take little comfort in the certificate's issuance when a suit to revoke the certificate may ensue. "The prospect of one agency of the United States government suing to overturn the ruling of another agency is hardly likely to reassure a business community seeking clarification and guidance." Shenefield Statement at 12.

Finally, the need to obtain certification to enjoy the antitrust exemption requires exporters to employ the procedures and implies that uncertified joint export conduct somehow violates the antitrust laws. The Sherman Act itself states that it is addressed to "trade or commerce . . . with foreign nations." 15 U.S.C. §§ 1, 2. The exact intent of this phrase has been unclear and "[t]he mere fact that the Webb-Pomerene Act was passed in 1918 . . . highlights the fact that there was congressional uncertainty as to the reach of the Sherman Act." Goldsweig Statement at 5.

Expansion of the Webb-Pomerene Act through a certification provision would add greater uncertainty to congressional intent.

> Legislative steps to expand and clarify the Webb-Pomerene exemption would . . . implicitly suggest . . . that the American antitrust laws may be violated by collective actions by U.S. companies vis-a-vis foreign buyers and competitors.
>
> By providing elaborate regulatory mechanisms for obtaining antitrust exemption, such legislation would strongly imply that firms which engage in export cooperation (or other export "restraints") without an exemption are fully subject to antitrust sanctions. (Atwood Statement at 12)

To summarize, much of the testimony and many of the comments that the Subcommittee received supported a certification procedure as a means of achieving in the words of Secretary Baldrige, the "maximum degree" of certainty about the effect of United States antitrust laws. On the other hand, other testimony and comment in the Subcommittee's proceedings were highly critical of the specific procedures envisioned by H.R. 1799 (as introduced), H.R. 1648, and S. 734. One antitrust expert acknowledged that while many experts seek the "feeling of immunity which some people think they will obtain from a piece of paper issued to them by the Commerce Department," there would be "an incredible bureaucratic cost" in getting that piece of paper. Testimony of Joseph P. Griffin of the law firm of Wald, Harkrader & Ross, at the November 19, 1981, Hearing on International Antitrust Jurisdiction, Hearing Transcript at 66. As one businessman testified, "[f]rankly speaking, the certification procedure outlined in S. 734 appears designed more to keep lawyers employed than to encourage exports." Prepared Statement of Gordon O. F. Johnson, dated June 24, 1981 (emphasis in original).

(3) *Testimony in Support of Modified Certification Procedures.*—A number of witnesses who criticized the certification procedures in the export trading company bills suggested that the Subcommittee might consider a more simplified procedure through which a prospective exporter could rapidly obtain the binding advice of the Department of Justice. Professor Eleanor Fox testified that:

> The Department's existing business review procedure is seldom used, since businesses and their lawyers perceive that they have little to gain and more to lose.
>
> We should seriously consider granting more protection to the recipient of a favorable business review letter. One suggestion would be a statutory change providing that the recipient is protected against treble (but not single) damages and against criminal prosecution for all acts covered by the business review letter and undertaken during the time such letter was in effect. (Fox Statement at 6–7).

Mr. Victor suggested that, if a regulatory approach were to be pursued, simplicity was important and that the antitrust agencies—the Department of Justice and the Federal Trade Commission—be responsible for its administration. (Victor Statement at 8–10.)

At the April 8, 1981, hearing, Mr. Shenefield characterized the certification procedures of H.R. 1648 as a "nightmare" (Shenefield Statement at 13), and suggested an amendment to the Foreign Trade Antitrust Improvements Act similar to Professor Fox's:

> I would suggest consideration of an addition to H.R. 2326 that would have the effect of making the business review response, while it is outstanding, effective to preclude later criminal prosecution or treble damage actions. It would still be open to the enforcement agencies, following withdrawal of the business review letter, to obtain prospective injunctions. It would likewise be open to injured U.S. companies to recover single damages. (Shenefield Statement at 11–12).

The Subcommittee staff prepared a draft embodying these principles for the hearing on June 24, 1981. The exporters and export trade

consultant who were the witnesses at that hearing strongly supported the simplified, "optional" approach of the Subcommittee draft, preferring these procedures over those in the export trading company legislation. See Hearing Transcript of June 24, 1981.

E. Major aspects of the subcommittee amendments

(*1*) *Simplicity.*—It was the consensus of the Subcommittee that many of the concerns expressed about the certification procedures could be eliminated or minimized by substituting alternative procedures, many of them based on the testimony offered at the hearings.

The most important goal of the Subcommittee amendment, offered by Mr. Hughes, was to simplify procedures, consistent with the goals of antitrust enforcement, while preserving the basic certification device to afford the maximum degree of certainty.

(*2*) *Voluntary certification.*—Certification under the Subcommittee amendments is voluntary. As explained more fully above, the various export trading company bills created a negative implication that, absent certification, joint export conduct would violate the antitrust laws. The Subcommittee amendment offers no exemption. It merely offers the applicant an opportunity to obtain a binding advisory opinion. Such an opportunity creates no implication that uncertified conduct violates the antitrust laws.

Under the clarified standards governing application of American law to international business transactions contained in H.R. 5235, the Committee expects that there will be much joint export activity for which certification is not sought. In those cases where no real doubt exists about the legality of the conduct, an advisory opinion will not be needed. Moreover, reasonable inference may be drawn from the failure to seek certification. The voluntary certification procedure does give the applicant a chance for greater certainty when the antitrust ramifications are truly in doubt. Certification will also remove the punitive aspects of possible antitrust legality arising out of certified conduct.

(*3*) *Single criterion.*—The Subcommittee amendment uses one criterion to determine whether to issue a certificate of review—whether the conduct is likely to violate the antitrust laws. Some versions of the export trading company bills (H.R. 1648 and S. 734) look to other criteria as well—for example, whether there is a need to export the goods or services and whether the transaction is effectively a transfer of technology. The Subcommittee record provides no basis for including these extra restrictions. These additional determinations could complicate and prolong the decisionmaking process, increase substantially the amount of information that an applicant would need to submit, and make the outcome of the process more uncertain.

The Subcommittee amendment, on the other hand, looks to a single, flexible criterion. Rather than restating the major principles of the antitrust laws, which could change, the Subcommittee amendment merely looks to the antitrust laws in force at the time certification is sought.

The determination that the Department of Justice will have to make is practical as well as legal; rather than merely requiring a legal judgment as to whether the conduct would violate the antitrust laws, the standards call for a prediction of whether the conduct will be *likely* to violate the antitrust laws. This determination calls upon

the experience, expertise, and knowledge of the Department of Justice in analyzing the applicant's proposed conduct against the backdrop of market structure and history. The Committee anticipates that, in time, the Department will gain enough experience to issue guidelines similar to its merger guidelines that will provide an indication of market structural characteristics least likely to result in antitrust violations.

(*4*) *Department of Justice role.*—The Subcommittee amendment gives the Department of Justice the decision making authority in the certification process. The amendment reflects both the desirability of a single decision maker and the logic of placing that role in the agency with antitrust expertise.

As more fully described above, many of the witnesses criticized the procedures of the export trading company bills, because they contemplated the involvement of, and coordination among, three departments and agencies of the federal government. Mr. Emery testified that the experience of the government with such multi-agency procedures had been negative. As he stated:

> I have found over the years that it is almost impossible to explain to the average citizen the logic of their having received conflicting advice from separate government agencies. When citizens deal with their Federal government, they think of it as one government and they do not understand why it does not respond as one. For this reason alone, it would be advisable to vest the proposed "certificate" authority in one agency. (Prepared statement of Fred Emery, dated June 24, 1981, at 3).

Although it is not always possible that the federal government "speak with one voice," it is important that there be a single decision maker when the major goal of the legislation is to promote certainty.

The Subcommittee hearing record strongly questions giving final authority to the Commerce Department to grant exemptions from the antitrust laws. That agency has little antitrust expertise and no enforcement responsibilities. Several witnesses were concerned that the Department of Commerce would, in the long run, tend to disregard serious antitrust violations while removing them from the enforcement authority of the other federal agencies. Commenting on the certification title of H.R. 1648, Professor Rahl noted:

> [I]t delegates to the Secretary of Commerce great power to abrogate the antitrust laws insofar as exports are concerned. It seems to me unwise to lodge such power in an authority having no other responsibility for maintaining a coherent antitrust policy and lacking experience and expertise in this area.
>
> Although the antitrust enforcement agencies may object, and may also seek an injunction, they would be placed in the position of launching a court attack on a decision of the head of a coordinate executive branch, and would either be reluctant to do so, or would thereby present a rather awkward spectacle . . .
>
> Most important of all, I do not see any safeguard against the Secretary's allowing the applicant for a certificate to

enter into international cartel or other arrangements, in the name of promoting exports. (Prepared statement of Professor James A. Rahl, dated March 26, 1981, at 14).

Indeed, there is much to suggest that, in the long run, potential exporters will be better off dealing directly with the Department of Justice. Given the extensive experience and expertise of the Department of Justice, a review of business plans by that Department will afford greater certainty that the contemplated conduct will not be likely to violate the antitrust laws. Approval by the Department of Justice should discourage private suits that claim that the conduct exceeds the scope of the certificate. Finally, conferring responsibility for the ultimate decision in the Department of Justice will reduce the possibility that the Department will play a dissenting and obstructive role. Mr. Emery testified, with some force, that split authority creates "a human problem" from which tension will inevitably arise. Hearing Transcript of June 24, 1981, at 45. On the other hand, decisionmaking carries with it an obligation to act responsibly. As Mr. Emery stated, "if you tell Justice, it is yours, I think Justice, in the long run, may be more cooperative than they would be if they can sit on the side and just throw darts at Commerce . . ." (Id. at 30–31). The Committee expects that the Department of Justice will discharge its tasks consistent with the purpose of the legislation to assist exports, and the Committee will monitor the Department's performance.

Even under the export trading company certification proposals, as introduced, enforcement authorities would examine the exporter's application. The need and appropriateness of such a review was universally acknowledged. If there were substantial objections on enforcement grounds, any certificate of review issued by the Secretary of Commerce could be challenged in court by the enforcement agencies. As the testimony recites, a certificate issued over the objections of the enforcement authorities could place the certificate holder under intense and prolonged scrutiny, a situation not conducive to long-term planning for joint export activity. By eliminating these concerns, the Subcommittee amendment offers the maximum certainty that can reasonably flow from a certification process.

(5) *Single damages and limited injunctive relief.*—The legal protections offered by a certificate of review under the Subcommittee amendment are substantial. With respect to conduct covered by the certificate, the holder would be protected from all criminal liability under federal and state antitrust laws. The certificate also confers protection from liability in civil damage actions brought by federal and state enforcement authorities under federal and state antitrust law. In addition, in private actions by injured consumers, competitors and other parties, the holder of a certificate would be protected from the two-thirds punitive portion of the treble damage remedy, and from injunctive sanctions for threatened harm. A certificate holder would continue to be liable for the actual damages including interest from the date of injury caused by a proven violation of the antitrust laws that has caused actual injury.

The Subcommittee position is a compromise between those who wished to retain the traditional treble damage remedies for proven

antitrust violations and those who felt that certified conduct should be insulated from any relief whatever. The Committee felt strongly that actual damages should be retained. A person injured by antitrust violations arising out of joint export conduct often is a competing United States exporter. Such a person has enjoyed, and should continue to enjoy, the protection of our antitrust laws. Moreover, if no relief were available to a person injured by a violation, the Department of Justice would have to err on the side of caution in close cases, making it more difficult to obtain certification. In addition, fairness would require the Department to employ elaborate procedural protections to protect the rights of those who fear injury but have no remedy after the certification is granted.

The simple procedures of the Subcommittee amendment could be replaced by cumbersome quasi-judicial proceedings with extensive notice and participation requirements. Moreover, if zero damages were the rule, the only way a court could compensate the injured American business would be to hold the conduct in question to be ultra vires, in which case treble damages would lie. Consequently, single damages, like certification by the Department of Justice, may actually increase the protection afforded by a certificate.

The availability of injunctive relief against continuing violations where actual injury has occurred in a corollary to the single damages formulation, and is necessary for the same reasons. The requirement of actual harm protects certificate holders from suits based on threatened injury.

The bill reported by the Committee does, however, address a concern of American exporters that they will be subject to meritless suits brought to harass effective and vigorous competitive export conduct. In addition to limiting the damage recovery to the actual damages (plus interest from the date of injury), the bill will allow a defendant to obtain a reasonable attorney's fee incurred in successfully defending such a suit. Any plaintiff contemplating suit against a certified exporter must weigh the additional cost of the defendant's reasonable attorney's fee, if the suit is unsuccessful.

(6) *Other provisions.*—The Subcommittee amendment contains other provisions to improve the certification procedures. For example, it provides for the return of submitted documents and for protections from unnecessary disclosures of submitted materials under the Freedom of Information Act and otherwise.

To help the Department of Justice obtain information, the Subcommittee amendment allows the Department to request more information after an application has been submitted. To protect the integrity of the process, the Subcommittee amendment also provides that an application obtained by fraud is void ab initio.

IV. THE PROVISIONS OF H.R. 1799, AS AMENDED

Section 201.—Export trade promotion duties

Section 201 gives the Attorney General the basic authority to issue certificates of review. A Committee amendment to the Subcommittee version makes clear that the Secretary of Commerce may advise and assist applicants by providing information and explaining legal requirements.

Section 202.—Application

Section 202 states the procedures that a person must follow to apply for a certificate of review. To obtain a certificate of review, any individual, firm, partnership, association, public or private corporation, or other legal entity, including a public or private body, submits a written application to the Attorney General. A Committee amendment to the Subcommittee bill also allows the applicant to submit an application to the Secretary of Commerce or any of the Department of Commerce's office around the country. The Secretary of Commerce shall forward applications to the Attorney General within 7 days of receipt. All applications must be in a form and contain all information required by the Attorney General.

Within 10 days of receiving the application, the Attorney General shall publish in the Federal Register a notice identifying the applicant and describing the conduct for which certification is sought. The Committee considered whether to strike this notice provision because it might give competitors of the applicant an advantage, but it determined to keep the notice procedure to allow interested persons to bring matters bearing on the certification process to the attention of the Attorney General.

To allow enough time for members of the public to contact the Attorney General, no certificate may be issued until the 30-day period, which begins on the date the application is received by the Attorney General, expires.

An application for issuance of a certificate and the certificate itself must be limited to export trade activities; it is not required that the exclusive—or even the principal—business of the applicant be export-related.

Section 203.—Issuance of certificate

Section 203 provides that the Attorney General shall issue a certificate if a proper and complete application is submitted unless he determines that the conduct is likely to violate the antitrust laws.

The Attorney General must issue this within 60 days after receiving an application. The 60-day period for an application submitted to the Department of Commerce does not start running until it is received by the Department of Justice. Prior to expiration, the Attorney General may request additional information from the applicant. In this case, he will have 30 more days after all requested material is submitted to make the determination. The Attorney General is expected to tailor requests for information to his informational needs; however, determinations on whether the applicant has approved sufficient information are within the sole discretion of the Attorney General.

In determining whether the conduct is likely to violate the antitrust laws, the Attorney General is to consider all issues, including jurisdictional questions, and is to be guided by the stricter of judicial interpretations and enforcement policy.

As explained above, the Attorney General shall use the Department of Justice's knowledge of the structure, history and marketing methods of the industry along with any particular knowledge of the applicant in assessing whether it is likely that the proposed conduct will lead to violation of the antitrust laws. No formal procedures under the Administrative Procedure Act are to apply to the certification process.

If the Attorney General determines the conduct specified in the application is not likely to violate the antitrust laws, a certificate will immediately be issued subject to appropriate terms and conditions. In the event the Attorney General determines that the conduct is likely to violate the antitrust laws, he will immediately transmit to the applicant a statement of the determination and reasons for it.

If the Attorney General denies an application and the applicant thereafter requests in writing the return of documents, the Attorney General shall return these materials and all copies within 30 days, except to the extent the information has been made publicly available.

Each certificate of review, issued by the Attorney General, shall specify:

1. The conduct, including activities and methods of operation, to which the certificate applies;
2. The business entities participating in the conduct;
3. Any terms and conditions applicable to the conduct.

The terms of the certificate are very important for two reasons. First, the Department is expected to use the certificate to ensure that violations are not likely, by specifying the protected conduct, the protected persons, and the terms of the protection. Second, the protections of a certificate are effectively governed by its terms. Persons other than those to whom the certificate is issued, "uncertified" conduct, and conduct exceeding the terms and conditions in the certificate are not protected.

A certificate of review obtained by fraud is void ab initio.

Section 204.—Reporting requirements; amendment of certificate

Section 204 provides that any person who receives a certificate of review shall promptly report to the Attorney General any change relating to the three factors specified by Section 203(d) for inclusion in the certificate of review and may submit to the Attorney General an application to amend the certificate to reflect the changes. An application to amend a certificate of review is essentially treated the same as an application for the issuance of a certificate, except that the effective date of the amendment shall be the date on which the application for the amendment is submitted to the Attorney General.

Section 205.—Modification or revocation of certificate

Section 205 provides that if, at any time, the Attorney General finds that the conduct engaged in under the certificate violates, or is likely to violate, the antitrust laws, he shall give written notice to the person to whom the certificate was issued, including a statement of the reasons for the determination. The Attorney General shall modify or revoke the certificate, as may be appropriate, in not less than 30 and not more than 60 days. The primary purpose of this time period is to permit the certificate holder to call to the Attorney General's attention any matter militating in favor of continuing the certificate in force. The person to whom the affected certificate was issued may sue in any appropriate district court of the United States to set aside such determination on grounds that it is erroneous. Given these procedural steps, the district court, in most cases, should be able to base its decision on the record before the Attorney General without the need for an evidentiary hearing.

Section 206.—Judiciary review

Section 206(a) provides that, except as specified in Section 205(b) dealing with modification and revocation, no determination made by the Attorney General with respect to the issuance, amendment, or revocation of a certificate shall be subject to judicial review.

An applicant may not obtain judicial review of the denial of the application. Rather than litigate, it is expected that the parties will negotiate an approvable certificate. No one may obtain judicial review of the grant of an application. This is to protect the certificate holder's interest and promote exports. Section 206(b) provides that no determination made by the Attorney General with respect to the issuance, amendment, or revocation of a certificate of review shall be admissible into evidence in any administrative or judicial proceeding in support of any claim brought under the antitrust laws. This provision is primarily intended to encourage full and necessary disclosure for certification purposes with no risk of exposure to allegations that a certificate denial may be taken as evidence of antitrust violations.

Section 207.—Protection conferred by certificate of review

Section 207(a) provides that no person to whom a certificate of review is issued shall be subject to a criminal action for a violation of the United States antitrust laws or a violation of any state law similar to the federal antitrust laws if the violation arises from conduct specified in the certificate, and, if the certificate is in effect at the time the conduct occurs. Section 207(b) adds that no person to whom a certificate of review is issued shall be liable for damages in a civil action brought by the Attorney General or a State.

Section 207(c) provides that no person to whom a certificate of review is issued shall be liable for damages exceeding actual damages, the loss of interest on actual damages, and the cost of suit (including reasonable attorney's fees) for a violation of the antitrust laws arising from conduct specified in the certificate. The purpose of this provision is to make certain that an injured person (e.g., a customer or competitor) receives a complete recovery for any actual damages arising from an antitrust violation including interest from the date of injury. A certificate holder is protected against treble damages. In addition, protection against unmeritorious suits is provided by the rule that the a successful defendant is entitled to the costs of defending against such suit if the court finds:

(A) The conduct alleged to violate the antitrust laws does not violate the antitrust laws;

(B) The conduct is specified in the certificate of review; and

(C) The certificate of review was in effect at the time the conduct occurred.

Section 207(d) provides protection against private injunctive suits based upon threatened, as opposed to actual, injury.

Some disagreements concerning whether conduct is protected by a certificate are inevitable. In determining questions of coverage, the court need not look beyond the certificate itself. Protection is denied to persons or actions not specified in the certificate, and to conduct violative of the terms specified in the certificate.

Section 208.—Injunctive relief

Section 208 provides that except as provided in section 207(d) (regarding actions under section 16 of the Clayton Act), a certificate of review shall have no legal effect on the authority of a court to grant equitable relief in an action for a violation of the antitrust laws brought against the person to whom the certificate is issued. In granting the relief, the court shall have jurisdiction to modify or revoke the certificate of review, as may be appropriate.

This provision preserves the right of the Attorney General to sue for injunctive or other equitable relief against violative conduct or threatened violative conduct before a certificate is revoked or in lieu of revocation. In addition, private persons may sue for injunctive or other equitable relief in case of actual, as opposed to threatened, injury.

Section 209.—Disclosure of information

Section 209(a) provides that information submitted by a person in connection with the issuance, amendment, or revocation of a certificate shall be exempt from disclosure under the Freedom of Information Act, 5 U.S.C., § 552. This exemption covers all information submitted by applicants or other parties in connection with certification procedures. This section affords the Attorney General power to withhold information under the Freedom of Information Act, 5 U.S.C., § 552 (b)(3).

Section 209(b) prohibits the Attorney General and other officials from releasing proprietary information, except under certain circumstances. The type of information that may not be released is information that would be exempt from mandatory disclosure under Exemption 4 of the Freedom of Information Act, 5 U.S.C., § 552(b)(4). This section does not prohibit the Attorney General from releasing nonproprietary information.

Even proprietary information submitted in connection with a certificate of review could be provided—

(A) Upon a request made by the Congress or any committee of Congress,

(B) In a judicial or administrative proceeding,

(C) With the consent of the person who submitted the information,

(D) In the course of making a determination with respect to the issuance, amendment, or revocation of a certificate of review, if the Attorney General deems disclosure of the information to be necessary in connection with making the determination,

(E) In accordance with any requirement imposed by a statute of the United States, or

(F) In accordance with rules issued pursuant to this act permitting the disclosure of the information to an agency of the United States or of a State on the condition that the agency will disclose the information only under the circumstances specified in paragraphs (A) through (E).

These provisions set forth the circumstances under which the Attorney General and other officials may release information notwithstanding its proprietary nature. Paragraph (A) allows the Attorney General to release proprietary information upon a request of Congress or a congressional committee. No compulsory process is required; how-

ever, the material must be released pursuant to a request. and the request must come from a committee or the Congress itself and not an individual member. Provided the request is made by a Committee or Subcommittee Chairman, the Attorney General need not determine if there has been a Committee or Subcommittee vote. Paragraph (B) allows the Attorney General to release proprietary information in administrative and judicial proceedings including the certification proceeding for which the material is submitted. This provision does not prohibit the imposition of a protective order by an administrative tribunal or court. This section, together with paragraph (D), allows the Attorney General to publish the complete contents of issued certificates.

Paragraph (D) permits the Attorney General to contact third parties in carrying out any information gathering necessary to determine if a certificate should be issued, amended or revoked.

Paragraph (F) permits the Attorney General to share information with federal and state agencies, pursuant to Rule, provided that the receiving agency abides by the same confidentiality rules.

Section 210.—Descriptive guidelines

Section 210 gives the Attorney General authority to issue descriptive guidelines to help applicants and potential applicants. These guidelines, which would describe types of conduct that have been or would be approved or disapproved, could be based on actual determinations or hypothetical examples. The relationship requirements of the Administrative Procedure Act, 5 U.S.C., § 553, shall not apply.

Section 211.—Issuance of rules

Section 211 both authorizes and requires the Attorney General to issue implementing rules within 90 days of enactment.

Section 212.—Definitions

Section 212 defines important terms. "Antitrust laws" includes Section 5 of the Federal Trade Commission Act, to the extent that Section 5 addresses unfair methods of competition, as well as the laws described in Section 2 of the Clayton Act, 15 U.S.C., § 12(c). In determining whether conduct is likely to violate the antitrust laws, the Attorney General must consider pertinent antitrust rulings under the Federal Trade Commission Act.

"Attorney General" includes designees.

"Certificate of Review" means a certificate granted under Section 203.

"Export Trade" includes the export of both goods and services.

"State" shall have the meaning of Section 4G of the Clayton Act.

Section 213.—Effective date

The application and issuance procedures of Sections 202 and 203 will become effective 90 days after the effective date of the rules promulgated under Section 211.

V. INFORMATION SUBMITTED PURSUANT TO RULES

1. Budget statement

Pursuant to Clause 2(1)(3)(b) of House Rule XI, the Committee sets forth the following. H.R. 1799, as introduced, contained an au-

thorization of $20 million in each fiscal year 1982 through 1985. This authorization did not relate to the antitrust provisions and was reported by the Committee on the Judiciary. The Committee understands that the Committee on Foreign Affairs is deleting this authorization and that it will not be voted on by the full House; however, the cost estimate of the Congressional Budget Office, infra, includes this authorization, which is no longer relevant.

The relevant portion of the Congressional Budget Office cost estimate recites that the Department of Justice would require about $500,000 in fiscal year 1983 to discharge its responsibilities and somewhat less thereafter The Department of Commerce would require about $200,000 annually. The Committee agrees with this projected cost estimate.

2. Cost estimate

The Committee concurs with the estimate provided by the Congressional Budget Office, insofar as the estimate projects costs for certification by the Department of Justice of approximately $500,000 during fiscal year 1983 and less thereafter and costs of about $100,000 annually for the Department of Commerce. Pursuant to Clause 2(1)(3)(c) of House Rule XI set out in the estimate of the Director of the Congressional Budget Office.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., July 13, 1982.

Hon. PETER W. RODINO, JR.,
Chairman, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for H.R. 1799, the Export Trading Company Act of 1981.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

ALICE M. RIVLIN, *Director.*

CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

1. Bill number: H.R. 1799.

2. Bill title: Export Trading Company Act of 1981.

3. Bill status: As ordered reported by the House Committee on the Judiciary, June 15, 1982.

4. Bill purpose: H.R. 1799 would direct the Secretary of Commerce to promote actively the formation of export trading companies. It would require that an office within the Department of Commerce (DOC) be established with responsibility for providing information about export trade services, as well as assisting potential exporters in preparing applications for the antitrust certification procedure.

H.R. 1799 would authorize $20 million in each fiscal year 1982 through 1985 to assist businesses in making new investments for producing goods for export and would require the Department of Justice (DOJ) to review and certify export trading companies. In addition,

Title I would allow bank holding companies to form export trading companies if approved by the appropriate banking regulatory authority.

5. Cost estimate:

[By fiscal years, in millions of dollars]

	1982	1983	1984	1985	1986
Loan programs:					
Authorization level	20	20	20	20	
Estimated outlays		14	14	10	3
Interest receipt to the Treasury (function 900) [1]		−1	−2	−3	−4
Other provisions:					
Estimated authorization level		1	1	1	1
Estimated outlays		1	1	1	1
Total budget impact:					
Estimated authorization level	20	21	21	21	1
Estimated outlays		15	15	11	4

[1] Interest payments by SBA to the Treasury are defined as receipts in function 900 and as outlays in function 370, but have no net impact on the budget as a whole.

For purposes of this estimate, it was assumed that $40 million in loan guarantees in each fiscal year 1982 through 1985 would be available for obligation. These amounts represent contingent liabilities of the federal government. The outlays and cost of the guarantee loans in this estimate reflect an allowance for defaults in each of the fiscal years 1983 through 1986. Additional defaults beyond 1986 are estimated to be approximately $19 million.

For many government activities, the costs and outlays are identical. For loan programs, however, costs differ substantially from outlays. The costs of this bill are therefore summarized separately below:

Total estimated costs:

Fiscal year:	*Millions*
1982	
1983	
1984	$2
1985	3
1986	2

The costs of this bill fall primarily within budget functions 370 and 750.

6. Basis of estimate: For purposes of this estimate, it was assumed that this bill would be enacted by August 1, 1982, and that the amounts authorized to be appropriated in 1982 and 1983 will be available prior to the beginning of fiscal year 1983.

Loan programs

Section 106 authorizes $20 million in each fiscal year 1982 through 1985 for the Small Business Administration [SBA] and the Economic Development Administration to make loans and loan guarantees to export trading companies. It was assumed that approximately half the amount authorized in each fiscal year would be available for direct loans, and the remainder for guarantee loans. Using SBA current loan programs as a model, and assuming that a total of $40 million would be available for repurchase of guarantee loans that default, it would be possible to conduct an annual guarantee loan program of approximately $40 million in each fiscal year 1982 through 1985.

For purposes of this estimate, it was assumed that although approximately $10 million in direct loan authority and $40 million in guarantee loan authority would be available in 1982, loan outlays would not begin until 1983, thus allowing time for the implementation of this new program.

The authorization level for direct loans is assumed to be $10 million in each of the fiscal years 1982 through 1985. Outlays for direct loans are calculated by assuming that once obligated, all direct loans are disbursed over a two-year period based on SBA historical disbursement rates. The repayment schedule is derived from amortization tables, and assumes an interest rate of approximately 15 percent per year and an average maturity of 10 years. The cost of this program represents the defaults of the various loans, offset by interest income and recoveries from loan defaults.

For the guarantee loan program, the authorization level included in this estimate is the estimated amount required to cover loan repurchases expected to occur over the life of the loans. Currently it is estimated that approximately 22 percent of all guarantee loans will default over an eight-year period, with ultimate recovery of approximately 30 percent.

SBA pays interest to the Treasury on its outstanding loan disbursements. The payment to the Treasury (Function 900) is based on disbursements from the direct loans authorized by this bill. The interest payment represents an outlay to SBA but a receipt to the Treasury, with no net budget impact and no net cost to the government.

Other

With the exception of the loan programs, H.R. 1799 provides no authorization of appropriations to carry out the activities outlined in the bill. It is estimated that approximately $200,000 annually will be required by DOC to establish an office to promote exports. Depending upon the number and complexity of the applications for certification, it is estimated that the DOJ would require approximately $500,000 in fiscal year 1983, and somewhat less annually thereafter, to review and certify export trading companies.

In addition, Title I of H.R. 1799 would allow bank holding companies to form export trading companies. Any additional cost to the appropriate federal banking agencies that have authority to approve such investments would be offset by assessments to member institutions, resulting in no net cost to the federal government.

7. Estimate comparison: None:

8. Previous CBO estimate: On May 12, 1982, CBO prepared a cost estimate for H.R. 1799, as ordered reported by the House Committee on Foreign Affairs on April 22, 1982. No loan programs were authorized in that version of H.R. 1799. It also gave the DOC, rather than the DOJ, the lead role in certifying export trading companies, although the estimated cost was approximately the same.

On June 29, 1982, CBO prepared a cost estimate for H.R. 6016, as ordered reported by the House Committee on Banking, Finance and Urban Affairs on June 12, 1982. The provisions of H.R. 6016 applied only to certification of banks holding companies and bankers' banks in export trading companies. It authorized the Board of Governors of the Federal Reserve System to establish review procedures for this purpose.

9. Estimate prepared by: Mary Maginniss.
10. Estimate approved by:

C. G. NUCKOLS
(For James L. Blum,
Assistant Director for Budget Analysis).

3. Inflationary impact statement

Pursuant to clause 2(1)(4) of House Rule XI the Committee estimates that this bill will not have an inflationary impact on prices and costs in the operation of the national economy.

4. Oversight findings

The Subcommittee on Monopolies and Commercial Law of this Committee exercises oversight responsibilities with respect to enforcement of the Federal antitrust laws. The favorable consideration of this bill was recommended by the Subcommittee. The Subcommittee will monitor developments under this legislation.

No findings or recommendations of the Committee on Government Operations were received as referred to in House Rule XI, clause 2 (1)(3)(D).

ADDITIONAL VIEWS OF CHAIRMAN RODINO

I am delighted that H.R. 1799 is about to be considered by the full House. The Subcommittee on Monopolies and Commercial Law and the full Committee on the Judiciary have devoted a great deal of time, effort and energy to developing a sound certification procedure that will afford maximum certainty to exporters and potential exporters while preserving the principles of free enterprise and a competitive economy that we hold so dear. The procedures that have been developed are the culmination of a lengthy bipartisan process of information-gathering, negotiation and revision. That process has continued through the Subcommittee and Committee's consideration of this legislation, and indeed, to this moment.

After the Committee reported out H.R. 1799, it became clear that the bill could be improved and the Committee's intent better carried out through a few additional modifications, and I therefore intend to offer the bill for passage in a form slightly different than the Committee reported. I believe that these clarifying changes are not controversial. In order that the record be clear, I briefly list the changes for the benefit of my colleagues.

1. In Section 202(a)(2), the suspension version makes clear that the Attorney General may require that the applicant for a certificate of review submit information on the market in which it operates. Under the Committee version, the Attorney General could have required this type of information by rule; the suspension version simply eliminates any doubt about the relevance of this type of information to the Attorney General's determinations of whether conduct is likely to result in a violation of the antitrust laws.

2. In Sections 203 and 205, the suspension version states that the determination that the Attorney General must make is whether the conduct "is likely to result in a violation of the antitrust laws"; the Committee version simply provided that the Attorney General determine if the conduct is "likely to violate the antitrust laws." Antitrust violations arise out of a number of factors, including conduct, market share, and intent. The language change reflects the Committee's understanding that the Attorney General may use all of his experience, expertise, and knowledge of the market and the applicant to make a prediction of whether, in light of all circumstances, an antitrust violation would likely ensue if the certificate were granted. If the conduct alone, as described by the applicant, does not amount to an antitrust violation, the Attorney General may deny the certification based upon his overall assessment of the likelihood of a violation.

3. In Section 203(b)(2), the suspension version makes clear that the Attorney General must grant the certificate unless he makes a determination that the conduct is likely to result in an antitrust violation. The Committee version of Section 203(b)(2) was arguably inconsistent with the basic standard provided in Section 203(a).

4. In Section 203(d)(2), the suspension version makes clear that the certificate issued shall specify the persons to whom it is issued, rather than the business entities participating in the conduct. I believe that it was the intent of the Committee that only holders of certificates should enjoy the protection of certificates.

5. In Section 207, the suspension version makes clear that the certificate protects conduct only if the "conduct that forms the basis of the violation [of the antitrust laws] is specified in the certificate. . . ." The Committee version, which provided that a person would not be liable if the "violation arises from conduct specified in the certificate" may arguably be open to the misinterpretation that a violation would be excused if it could be linked even indirectly to conduct specified in the certificate. If, for example, price fixing for the domestic market occurred in connection with an otherwise protected meeting of exporters, it was not the Committee's intent that the domestic price-fixing should be protected. Yet, without the change, it might be argued that the violation "arises from" protected conduct. In the suspension version, there is no room for such an argument.

6. In Section 207(b), the suspension version deletes States from the prohibition on damage actions. The Subcommittee and the Committee did not focus on this issue. States are not involved in the certification process, and are treated under the antitrust laws like other persons for the purposes of recovering damages for their injuries. Moreover, parens patriae actions perform important functions to protect consumers. There is, in short, no reason to treat damage actions brought by States differently from private damage actions, and therefore, the suspension version allows States a single damage recovery.

7. In Section 207(d), the suspension version increases the protection of a certificate of review by precluding injunctive actions based on state statutes for threatened injury. The purpose of the section is to cut off private statutory remedies based on threatened harm, and the suspension version is consistent with this intent.

8. In Section 211, the suspension version affords the Department of Justice 120 days, rather than 90 days, to issue implementing rules.

PETER W. RODINO, Jr.

ADDITIONAL VIEWS OF CONGRESSMAN JOHN SEIBERLING ON H.R. 1799

One can hardly overestimate the importance of a healthy export trade in American goods and services. Export of American goods provides jobs for our workers and revenue for our businesses. Our exports also distribute high quality American goods around the world and help to build national goodwill. However, not every piece of legislation proposed in the name of promoting exports is necessarily going to bring that result.

For years, some businessmen have complained that our antitrust laws prevented them from competing effectively abroad. Yet the last three decades have seen the greatest expansion of American business overseas in our history. Nevertheless, there have been increasing problems as other countries have gained economic strength. To give American business more flexibility in export and foreign trade, the Committee reported out H.R. 5235, which exempts export and foreign trade from the antitrust laws, so long as the activities do not have a direct adverse effect on the U.S. domestic market.

H.R. 5235 is now pending before the House for action. The prudent conservative course would be to pass H.R. 5235 and give it a chance to work before embarking on another new legislative approach to the problem. If H.R. 5235 does what it is supposed to do, H.R. 1799 is unnecessary.

Nevertheless, businessmen seek greater certainty in determining the application of the antitrust laws. To achieve that certainty, it was originally proposed that the Secretary of Commerce be authorized to grant antitrust exemptions for export and foreign trade activities. H.R. 1799, as reported by the Judiciary Committee, is a better approach in that it provides a procedure for antitrust advance clearance from the one agency most expert in enforcing the antitrust laws, that is, the Department of Justice.

H.R. 1799 as reported by the Judiciary Committee will provide an expeditious and fairly designed certification procedure, avoiding many of the concerns with the bill as introduced. However, no certification procedure can protect exporters from all of the risks associated with joint export activity. Many will hesitate to reveal their business plans to any government agency. Moreover, the very existence of a government certification can create doubts about antitrust compliance, and suits can always be filed charging that actual conduct exceeded the scope of the certification. Absolute protection simply cannot be afforded.

In short, I continue to believe that H.R. 1799 is, at least, premature, probably unnecessary, and possibly illusory.

JOHN SEIBERLING.

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